

No. 14713

IN THE

United States Court of Appeals FOR THE NINTH CIRCUIT

BESSIE ROTH,

Plaintiff and Appellant,

vs.

SAMMY DAVIS, JR.,

Defendant and Appellee.

APPELLEE'S REPLY BRIEF.

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TOPICAL INDEX

	PAGE
Statement of facts.....	1
Argument	2



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Statement of Facts.

This case involves the single question of whether or not the United States District Court had jurisdiction where certain fictitious defendants were named but were not served and did not appear and were actually dismissed by the District Court on motion of the Appellant before the conclusion of the trial.

The Appellant's complaint alleges in paragraph III as follows:

"The true names or capacities, whether individual, corporate, associate or otherwise, of defendants Doe I-X are unknown to plaintiff, who therefore sues said defendants by such fictitious names. When the true names, identities or capacities of such fictitiously designated defendants are ascertained, plaintiff will ask leave of court to amend this complaint to insert said true names, identities or capacities, together with the proper charging allegations"

No fictitious defendant was ever served or appeared in the action. At the conclusion of all the testimony on January 20, 1955, appellant made a motion in the District Court, to which no objection was made, to dismiss the cause as to certain named defendants. This motion was granted and the court at the same time dismissed the cause as to all fictitious defendants. The proceedings had, as will appear from the clerk's minutes dated January 20, 1955 in the supplement to the transcript of record on appeal filed here, are as follows: "Attorney Pollack for the plaintiff moves that this cause be dismissed as to the defendants Will Mastin, Sammy Davis, Sr. and Sammy Davis, Jr., a copartnership doing business under the fictitious firm name of Will Mastin Trio. Attorney Callaway states that defendants have no objection thereto and the court ordered this cause dismissed as to said copartnership only and the fictitious named defendants."

In view of the foregoing it is appalling that appellant would make a statement on the first page of her opening brief that "The Doe defendants have not been dismissed out of and are still parties to the action."

Argument.

As to whether or not the reasoning in the decision of *Molnar v. National Broadcasting Company, Inc.*, which is a decision by a District judge, is sound or not becomes moot in view of the fact that the Appellant invoked the jurisdiction of the District Court by alleging diversity of citizenship between Bessie Roth, the plaintiff, and Sammy Davis, Jr., a defendant, the principal actors in the case and now, being dissatisfied with the result of the litigation in the District Court, makes the claim that jurisdic-

tion was not properly lodged in the first instance. It will be noted that the citizenship of the so-called Doe defendants was not stated in the pleadings and factually the evidence clearly shows that there is no fictitious defendant against whom a recovery could be had by appellant.

Under Rule 21 the court had the authority to dispose of these fictitious defendants after the evidence was all in since no fictitious defendant had been served or appeared. The pertinent portion of the rule is "parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just." And also under Rule 41(b) see: *Hicks v. Bekins Moving and Storage Co.* (C. C. A. 9th, 1940), 115 F. 2d 406.

All the cases cited by the appellant, as transposed from the *Molnar* decision, are not in point and would not support appellant's position if the fictitious defendants had not been dismissed in the District Court before the conclusion of the proceedings there. It therefore appears that further argument by the appellee would be superfluous and the appeal should be dismissed.

Respectfully submitted,

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